Supreme Court, U.S.
FILED
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No. 06-

IN THE

Supreme Court of the United States

BETTY DOUGIA,

Petitioner,

v.

HOWARD GRAVES, individually and as Chancellor of the Texas A&M University System; JIM HULL, individually and as Director of Texas Forest Service; BOBBY YOUNG; GARY BENNETT; RICHARD DOTTELLIS; RODNEY MONK; DAVID COLTON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether there existed legal or factual issues under 42 U.S.C. § 1983, and, the Fifth and Fourteenth Amendments to the United States Constitution against the Texas Forest Service because it, and its employees, made a bad-faith investigation of alleged timber theft due to its custom and practice of turning a blind-eye to timber theft by the Texas timber industry.

2. Whether or not the Texas Forest Service, or any of its employees, were entitled to a qualified immunity under federal law for their bad-faith investigation of timber theft complaints and their willful blind-eye to this custom and practice by the Texas forest industry.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Betty Dougia ("Dougia"), respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 2006 U.S. App. LEXIS 12217 (unpublished opinion).

JURISDICITON

The United States Court of Appeals for the Fifth Circuit issued an opinion in favor of Respondents on May 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

There is a question raised of whether or not the Texas Forest Service ("TFS") violated Dougia's Fifth or Fourteenth Amendment Rights to the ownership and benefits of the timber on her property by that agency's assistance in creating or increasing the danger of the theft of her timber by the Texas forest industry. These constitutional provisions are furthermore invoked because TFS had no discretion to grant or deny Dougia's plea to it to investigate and stop timber theft on her property.

STATEMENT

On June 30, 2003, Dougia initiated this suit in the 88th District Court of Hardin County, Texas, against the then Chancellor of the Texas A&M University System, General Howard Graves, and Hull, the Director of the TFS, in their official capacities and against Colton, Young, Bennett, Dottlellis, and Monk in their official and individual capacities. Dougia alleged violations of her rights under the Fifth and

Fourteenth Amendments to the federal constitution in connection with the investigation by TFS of allegations of timber theft. She also claimed that her timber was taken in violation of the Takings Clause of the Texas Constitution. The Defendants removed the case to the United States District Court the Eastern District of Texas based on federal question jurisdiction under 28 U.S.C. § 1441 (b) and thereafter moved for a reply under Federal Rule of Civil Procedure 7 (a) which the district court granted.

The Respondents moved for a summary judgment on the Eleventh Amendment grounds as to the claims asserted against them in there official capacities as well as the state constitutional claims. The district court observed that the Respondents may have waived their Eleventh Amendment immunity by removing a case to federal court. See, *Lapides v. Board of Regents of the Univ.Sys.of Ga.*, 535 U.S. 613, 619-24 (2002). The Respondents also asserted that they were entitled to summary judgment on the merits of all claims and on the grounds of qualified immunity as to Dougia's claims pursuant to 42 U.S. § 1983; as well as a defense that the statute of limitations had run on the section 1983 claims.

The trial court granted the Respondents motion for summary judgment holding that Petitioner's federal and state constitutional claims were without merit and that the Respondents were entitled to qualified immunity from Petitioner's federal constitutional claims. The trial court's ruling went far beyond the grounds argued by Respondents.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed the trial courts rulings as described above on May 18, 2006. No motions for rehearing were filed by the Petitioner. All conditions precedent to the filing of this Petition for Writ of Certiorari have been met.

REASONS FOR GRANTING THE PETITION

Dougia's *First Amended Complaint* was her pleading upon which the respondents filed their *Motion for Summary Judgment*. It sets out certain facts that were never contested. Dougia called the TFS's Theft Hotline to report her theft. The factual allegations in that *Amended Complaint* set out the almost incestuous relationship between TFS and the Texas forest industry (ROA 45-52). The threshold question is: what sort of duty did TFS have when it became aware of specific claims of timber theft? This is a threshold question because of the statement by Justice Scalia, writing for the majority, in *Town of Castle Rock, Colorado v. Gonzales*, 125 S.CT. 2796, 2803, 162.Ed.L.2d 658 (2005). He began his analysis by noting that the Court's "cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion". He further noted that federal constitutional law determines whether a state-created interest rises to the level of an entitlement protected by due process (Id. at 2803-04). TFS had no discretion on this issue. It must investigate properly claims of timber theft and act accordingly. The Texas Natural Resources Code § 151.004 (3) specifically demanded that TFS set up and maintain a "timber theft hotline". That phone number is specifically set out in the statute as "1-800-364-3470". "[T]he intractable opposition and defiant attitude of the defendants toward the plaintiff's request for assistance" finally required a written opinion from the office of the Attorney General of the State of Texas requiring TFS to perform its official duties in this matter. See, informal letter ruling No. 32002-6043 (ROA 58-126). TFS's own press release of November 5, 2003, gave evidence that timber theft in East Texas is a major problem in that the TFS had spent the previous twelve months investigating many claims (ROA 56-57). In this regard, the Texas Legislature mandated certain "general duties" on the part of the Director of the TFS. The

Texas Education Code § 88.102 outlines those general duties of the Director of TFS:

> Under the general supervision of the board, the director shall:
>
> **(1)** assume direction of all forest interest and all maters pertaining to forestry within the jurisdiction of this state;
>
> **(2)** subject to the approval an confirmation of the board, appoint the assistants and employees necessary in executing the duties of his office and the purposes of the board, their compensation to be fixed by the board;
>
> **(3)** take any action deemed necessary by the board to prevent and extinguish forest fires;
>
> **(4)** enforce all laws pertaining to the protection of forests and woodlands and prosecute violations of those laws;
>
> **(5)** collect data relating to forest conditions; and
>
> **(6)** prepare for the board an annual report stating the progress and condition of state forestry work and recommending plans for improving the state system of forest protection, management, and replacement. (ROA 50)

See also, Texas Natural Resources Code §§ 151. 101; 152.012, et seq. These Texas Codes codify the Public Policy in Texas in favor of giving landowners whatever assistance they need from TFS. A recent case addressing these issues of Public Policy is found at *Harris v. Nelson*, 25 S.W. 3rd 917, 721-922 (Tex. App. – Beaumont 2002, no pet.). In analyzing the pertinent portions

of the Texas Natural Resources Code, the Beaumont Court of Appeals stated:

> The House Committee on Criminal Jurisprudence prepared a bill analysis concerning the background and purpose of Natural Resources Code, section 151.101. The analysis explains the objectives, circumstances of enactment, and, in part, the legislative history of section 151.101. See Harvesting of and Payment for Timber; Providing for Damages; Creating an Offense, 1997: House Comm. Report Bill Analysis on H.B. 1128 from House Comm. On Crim. Jurisprudence, 75th Leg., R.S., 1995 (1997). **The analysis informs us that theft was a primary concern of the legislature**. As background, the analysis noted that (a) timber is the number one agricultural commodity in the eastern part of Texas; (b) high timber prices make the forests in East Texas a "prime target for timber thieves;" and (c) the Texas Forest Service estimates "timberland owners have lost millions of dollars worth of trees to thieves." The stated purpose of the bill's pertinent section was to "address the unauthorized harvesting of timber" and provide "punishment for violations. (emphasis added)

The TFS policy of coziness with the Texas Forest Industry and indifference to lumber theft is in direct contradiction with the public policy of the State of Texas. It had an invariable duty to investigate timber theft claims and to insure that Dougia and other complainants' property interests were protected.

There is a "State-created danger" exception to the general rule that the State does not have an affirmative duty to protect its citizens from private acts of violence to a person's life or property. That exception comes into existence if a government entity substantially increases the likelihood that a private actor

would deprive an individual of her property rights. See, *DeShaney v. Winnebago County Dpt. of Social Services*, 489 U.S. 189, 195, 103 L.Ed. 32d 249, 109 S.Ct. 998 (1989), and its progeny. See also, *Howard v. Bayes*, 2006 U.S.App.LEXIS 20378; 2006 FED.App. 0285P(6 th Cir.) ("the courts prior 'property-as-entitlement' cases have all implicitly required the entitlement to have some monetary value to the entitlement holder in order to constitute a property interest"). No party to this case has questioned the Petitioner's property interest in the timber. The Petitioner had a procedural due process right to have TFS promptly and properly investigate her claim of timber theft. It has a statutory, and public policy, duty to work in good faith to eliminate the significant timber theft in Texas. Dougia had more than a mere abstract need or desire, or "unilateral expectation" to have her timber, and the timber of others similarly situated, protected from timber thieves. This was a matter of important public policy in Texas, set out in legislative history, and did not give TFS any discretion to refuse to assist land owners facing timber theft problems.

IMMUNITY CLAIMS

In considering whether there is a valid claim of qualified immunity on the part of the Respondents, the relevant, dispositive inquiry determining the claim, the Court must consider in particular: (1) whether the rights of Dougia in question were defined with reasonable specificity; (2) whether the decisional law of the United States Supreme Court and the applicable Circuit Court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful. See, *Pena v. Deprisco*, et al, 432 F.3d 98, 115 (2d Cir., 2006). As discussed, TFS and its employees were not confronting an unwritten, uncodified jumble of vague custom or habit. The statutes and public policy at issue in this case are clear. TFS had no discretion on whether or not it would seek

to reduce the theft of timber in Texas. It had no discretion on whether or not it would properly investigate theft claims and resolve the property-right issues of those involved.

The Respondents' *Summary Judgment Motion* regarding Petitioner's section 1983 claims were based upon the defensive claim that the statute of limitations had run before this lawsuit had been filed (ROA 161-162). The trial court denied summary judgment on that limitations claim (ROA 245-246). The trial court rejected the Respondents Eleventh Amendment claims (ROA 246-248). The Respondents *did not seek* a Summary Judgment on the merits of the Petitioners *1983* claim. Thus, the trial court's discussion of the merits of the claims brought under Section 1983 is mere surplussage and advisory! (ROA 161-162, 248-253). See, *Celotex Corp. v. Catrett* , 477 U.S. 317, 326, 106 S.Ct. 2458, 91 L.Ed. 2d, 265 (1986) ("Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all her evidence. See 244 U.S. App. D.C. at 167-168, 756 F.2d, at 189 (Bork J. dissenting); 10AC. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28-29 (1983)"). Judge Krone gave no notice to any party that either her *Memorandum or Summary Judgment Order* would go far beyond those issues a*ctually* raised in the Respondents' *Motion for Summary Judgment*.

DOUGIA'S FIFTH AMENDMENT CLAIM

The Respondents challenged to Dougia's Fifth Amendment claim was that she did not assert that the TFS was the one that stole her timber! That is correct. The Petitioner's claim is not that TFS is a thief but that TFS failed in its statutory and public policy duties, duties that were non-discretionary, to stop the common practice in Texas of timber

thievery, and to investigate individual claims of timber thievery and to restore the property to its rightful owner or see to it that other compensation was obtained. The claim by TFS that it is not itself a thief is but a *red herring* raised by TFS to confuse the issues for the Courts. Dougia concede the fact that TFS is not a thief. Be it true or not, it is not a ground for a summary judgment under the *actual pleadings* in this case.

CONCLUSION

For the forgoing reasons, Petitioner submits that this Court should grant in view of this case to reverse the holding of the trial court and the United States Court of Appeals for the Fifth Circuit. Alternatively, the Court should grant plenary view of the judgment below.

Respectfully Submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
2006 U.S. App. LEXIS 12217

No. 05-40036 Summary Calendar

BETTY DOUGIA, Plaintiff-Appellant,

versus

HOWARD D. GRAVES, Etc.; ET AL, Defendants,

DR. ROBERT D. MCTEER, Chancellor of the Texas A&M University System; JIM HULL, individually and as Director of Texas Forest Service; BOBBY YOUNG; GARY BENNETT; RODNEY MONK, Defendants-Appellees.

May 18, 2006, Filed

NOTICE: [*1] RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Texas. USDC No. 1:03-CV-625.

OPINION:

PER CURIAM*

JUDGES: Before REAVLEY, HIGGINBOTHAM and CLEMENT, Circuit Judges.

Betty Dougia appeals the district court's grant of summary judgment for the defendants in her suit filed under 42 U.S.C.§ 1983 [*2] . Dougia alleged that her rights were violated under the United States Constitution and the Texas Constitution. Dougia asserted that she entered into a contractual agreement with a logger to remove timber from her property. Following the removal, she felt as though she was not properly compensated. Dougia called the Timber Theft hotline of the Texas Forest Service (TFS) and requested an investigation into the matter. The investigation was delayed, and the report that was compiled after the investigation concluded that she had been overpaid by the logger. Dougia alleged that the report was compiled in bad faith.

The district court dismissed defendants two defendants without prejudice because they were never served. The court granted the other defendants' motion for summary judgment, concluding that Dougia failed to show a constitutional violation under the Fifth or Fourteenth Amendment of the United States Constitution or the Takings Clause of the Texas Constitution. The court noted that Dougia did not contend that the defendants interfered with or took her property for public purposes without just compensation. In the alternative, assuming for the sake of argument that Dougia had established [*3] a constitutional deprivation, the district court found that the remaining defendants were entitled to qualified immunity.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.R. 47.5.4

On appeal, Dougia does not challenge the dismissal of her complaint as to the defendants who were not served. Nor does she challenge the finding of qualified immunity as to any defendant with the exception of Rodney Monk. Accordingly, all arguments regarding these findings of the district court are waived. See *Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Dougia argues that the district court erred in granting summary judgment because there is a genuine issue of material fact regarding Monk's good faith. Dougia acknowledges that the state government did not take her property; she contends, in a one-sentence argument, that the TFS is responsible for the alleged taking because Monk filed a report that was not compiled in good faith. Monk's good faith is irrelevant, however; the district court granted summary judgment because Dougia did not prove any constitutional violations under either federal or state law. Dougia does not seriously challenge this finding on appeal and admits that her property was not taken by the state. As such, Dougia [*4] has waived any argument that she proved a constitutional violation. See *Hughes*, 191 F.3d at 613. Alternatively, she has not shown that the district court erred in granting summary judgment on grounds that she had not proved a constitutional violation.

The judgment of the district court is AFFIRMED.

Supreme Court, U.S.
FILED
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

CIVIL ACTION NO. 1:03-CV-625

BETTY DOUGIA,

Plaintiff,

versus

ROBERT McTEER, as Chancellor of the Texas A&M University System, JIM HULL, as Director of Texas Forest Services, BOBBY YOUNG, GARY BENNETT, RICHARD DOTTELLIS, RODNEY MONK and DAVID COLTON,

Defendants.

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MEMORANDUM AND ORDER

Pending before the court is Defendants Robert McTeer ("McTeer"), Jim Hull ("Hull"), Bobby Young ("Young"), Gary Bennett ("Bennett"), and Rodney Monk's ("Monk") (hereinafter collectively referred to as "Defendants") Motion for Summary Judgment (#19) and Motion to Strike Plaintiff's Response (#23). Defendants seek summary judgment on Plaintiff Betty Dougia's ("Dougia") claims alleging violations of the Fifth and Fourteenth Amendments to the United States Constitution pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Takings Clause of the Texas Constitution, TEX. CONST. art. 1, § 17. Dougia originally sued Howard D. Graves,

("Graves") in his official capacity as Chancellor of the Texas A&M University ("TAMU") System. Graves, however, is now deceased, and McTeer, the current chancellor of TAMU, has been substituted in his place. Because Defendants David Colton ("Colton") and Richard Dottellis ("Dottellis") have not been served with process in this action, they are subject to dismissal from this lawsuit. Having reviewed the pending motions, the submissions of the parties, the pleadings, and the applicable law, the court is of the opinion that summary judgment for the remaining Defendants is warranted on all claims. Defendants' motion to strike Plaintiff's response is, therefore, moot.

I. *Background*

This lawsuit stems from a disputed sale of timber. Dougia signed a contract with Griffin Forest Industries ("GFI") in 1997 to harvest timber on her property in Hardin County, Texas. She claims that GFI breached its contract by not paying her for all the timber harvested. Dougia alleges that GFI stole timber from her various tracts of land and sold it to Lonnie Grissom ("Grissom"), owner of G & W Logging. Dougia called the Texas Forestry Service ("TFS") Timber Theft Hotline in 1998 to report the alleged timber theft, but she claims TFS did nothing until 2001. Monk and Colton, TFS officers, then initiated an investigation, including a stump appraisal of Dougia's property conducted by Dottellis, a TFS forester. The TFS officers concluded that no theft had occurred based on the number of tree stumps remaining on her property and corresponding mill tickets. Dougia claims that the TFS investigation and findings were inadequate and deliberately false because Colton was a friend of Jim Griffin ("Griffin"), the owner of GFI. Dougia further alleges that Colton and Monk were personal friends of Grissom. Colton and Dottellis are named as defendants in this lawsuit, but they have never been served.

TFS claims that it investigated Dougia's allegations of timber theft but found no evidence to support them. Monk avers that he thoroughly investigated the claim and determined it to be groundless. In a sworn affidavit, Dottellis describes a comprehensive stump appraisal he conducted within the surveyed boundaries of Dougia's property using global positioning technology. TFS ultimately concluded that there was no evidence of any wrongdoing on Griffin's part and proceeded no further with the investigation. Dougia's complaint alleges that there was evidence of wrongdoing by Griffin, that TFS ignored the evidence she shared with the investigators, and that TFS "deliberately falsified its appraisal of the Plaintiff's timber losses." She further claims that Defendants failed to make a good faith effort to follow the "general duties" imposed on the Director of the TFS in § 88.102 of the Texas Education Code.

On June 30, 2003, Dougia instituted this action in the 88th Judicial District Court of Hardin County, Texas, against Graves and Hull in their official capacities as Chancellor of TAMU and Director of the T.S., respectively, and against Young, Bennett, Dottellis, Monk, and Colton, as individuals and in their official capacities as T.S. officers. Defendants subsequently filed a suggestion of death regarding Graves, and his successor, McTeer, was substituted as the proper party defendant. Defendants removed the case based on federal question jurisdiction under 28 U.S.C. § 1441(b). Defendants then moved for, and on October 6, 2003, were granted the right to secure a reply from Dougia pursuant to FED. R. CIV. P. 7(a). The court ordered Dougia to file an amended complaint, supporting her claims with "sufficient precision and factual specificity" as to the illegality of each defendant's conduct. She filed her amended complaint on November 10, 2003.

Dougia claims that she has been deprived by Defendants of rights guaranteed by the Fifth and Fourteenth Amendments

to the United States Constitution pursuant to 42 U.S.C. § 1983. She also claims that her timber was taken in contravention of the Takings Clause of the Texas Constitution. Dougia seeks equitable relief, a declaratory judgment compelling the state agencies and employees to perform their jobs properly, compensatory damages of $500,000, and "exemplify [sic] damages" of $2,000,000.

II. *Analysis*

A. *Summary Judgment Standard*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56©. The parties seeking summary judgment bear the initial burden of informing the court of the basis for their motion and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, which they believe demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 411 (5th Cir. 2003); *Terrebonne Parish Sch. Ed. v. Mobil Oil Corp.*, 310 F.3d 870, 877 (5th Cir. 2002); *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir. 1999). Where a defendant moves for summary judgment on the basis of an affirmative defense and, thus, bears the ultimate burden of persuasion, he "must adduce evidence to support each element of [his] defenses and demonstrate the lack of any genuine issue of material fact with regard thereto." *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 505 (5th Cir. 1999), *cert. denied*, 528 U.S. 1160 (2000) (citing *Exxon Corp. v. Oxxford Clothes, Inc.*,

109 F.3d 1070, 1074 (5th Cir.), *cert. denied,* 522U.S. 915 (1997)); *see Fontenot v. Upjohn Co.,* 780F.2d 1190, 1194 (5th Cir. 1986). To warrant judgment in his favor, the movant """must establish beyond peradventure *all* of the essential elements of the defense."""" *Martin v. Alamo Cmty. Coll. Dist.,* 353 F.3d 409,412 (5th Cir. 2003) (emphasis in original) (quoting *Chaplin v. NationsCredit Corp.,* 307 F.3d 368, 372 (5th Cir. 2002) (quoting *Fontenot,* 780 F.2d at 1194)).

"A fact is '*material*' if it '*might affect* the outcome of the suit under governing law.'"*Bazan v. Hidalgo County,* 246 F.3d 481, 489 (5th Cir. 2001) (emphasis in original) (quoting *Anderson,* 477 U.S. at 248); *see Harken Exploration Co. v. Sphere Drake Ins. PLC,* 261 F.3d 466,471 (5thCir. 2001); *Merritt-Campbell, Inc. v. RxP Prods., Inc.,* 164 F.3d 957, 961 (5thCir. 1999); *Burgos v. Southwestern Bell Tel. Co.,* 20 F.3d 633, 635 (5th Cir. 1994). "An issue is '*genuine*' if it is real and substantial, as opposed to merely formal, pretended, or a sham." *Bazan,* 246 F.3d at 489 (emphasis in original). Thus, a genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248; *accord Harken Exploration Co.,* 261 F.3d at471; *Merritt-Campbell, Inc.,* 164 F.3d at 961. The moving parties, however, need not negate the elements of the nonmovant's case. *See Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir. 1996) (citing *Little v. Liquid Air Corp.,* 37 F.3d 1069,1075 (5th Cir. 1994)).

Once a proper motion has been made, the nonmoving party may not rest upon mere allegations or denials in the pleadings but must present affirmative evidence, setting forth specific facts, to show the existence of a genuine issue for trial. *See Celotex Corp.,* 477 U.S. at 322-23; *Anderson,* 477 U.S. at 257; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585-86 (1986); *Rushing,* 185 F.3d at 505; *Wallace,* 80 F.3d at 1047; *Little,* 37 F.3d at 1075. "[T]he court must review

the record 'taken as a whole.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (quoting *Matsushita Elec. Indus. Co.*, 475 U.S. at 587). All the evidence must be construed "in the light most favorable to the non-moving party without weighing the evidence, assessing its probative value, or resolving any factual disputes." *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179,181 (5th Cir. 1996); *see Reeves*, 530 U.S. at 150; *Brown v. City of Houston*, 337 F.3d 539,541 (5th Cir. 2003); *Harken Exploration Co.*, 261 F.3d at471; *Daniels v. City of Arlington*, 246 F.3d 500, 502 (5th Cir.), *cert. denied*, 534 U.S. 951 (2001); *Colson*, 174 F.3d at 506. The evidence of the nonmovant is to be believed, with all justifiable inferences drawn and all reasonable doubts resolved in her favor. *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46,49 n.5 (1990) (citing *Anderson*, 477 U.S. at 255); *Martin*, 353 F.3d at 412; *Martinez*, 338 F.3d at 411; *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503,507 (5th Cir.), *cert. denied*, 540 U.S. 815 (2003); *Chaplin*, 307 F.3d at 372; *Harken Exploration Co.*, 261 F.3d at 471.

Nevertheless, "'only *reasonable* inferences can be drawn from the evidence in favor of the nonmoving party.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 n.14 (1992) (emphasis in original) (quoting H.L. *Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1012 (2d Cir. 1989)). "If the [nonmoving party's] theory is . . .senseless, no reasonable jury could find in his favor, and summary judgment should be granted." *Id.* at 468-69. The nonmovant's burden is not satisfied by "some metaphysical doubt as to material facts," conclusory allegations, unsubstantiated assertions, speculation, the mere existence of some alleged factual dispute: or "only a scintilla of evidence." *Little*, 37 F.3d at 1075; *see Anderson*, 477 U.S. at 247-48; *Wallace*, 80 F.3d at 1047; *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (citing *Forsyth v. Barr*, 19 F.3d 1527,

1533 (5th Cir.), *cert. denied,* 513 U.S. 871 (1994)). "Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment," *Brown,* 337 F.3d at 541; *see Bridgmon v. Array Sys. Corp.,* 325 F.3d 572, 577 (5th Cir. 2003); *Hugh Symans Group, plc v. Motorola, Inc.,* 292 F.3d 466,468 (5th Cir.), *cert. denied,* 537 U.S. 950 (2002).

Summary judgment is mandated if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to her case on which she bears the burden of proof at trial. *See Nebraska v. Wyoming,* 507 U.S. 584, 590 (1993); *Celotex Corp.,* 477 U.S. at 322; *Wenner v. BDM Enters., Inc,* 123 F.3d 321, 324 (5th Cir. 1997), *cert. denied,* 523 U.S. 1073 (1998). "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp.,* 477 U.S. at 322-23.

B. *Service of Process*

Although Dougia names seven persons as defendants in this suit, process has been served on only five of them. Defendants Colton and Dottellis have never been served. The Federal Rules of Civil Procedure impose time limits for service of process. *See* FED. R. CIV. P. 4(m). Rule 4(m) requires service of process on domestic defendants to be effectuated within 120 days after the filing of the complaint. If service is not accomplished within the applicable time frame, Rule 4(m) permits the court to dismiss the action without prejudice or to direct that service be completed within a specified time period. *See Thompson v. Brown,* 91 F.3d 20, 21 (5th Cir. 1996); *Hunt v. Smith,* 67 F. Supp. 2d 675,685 (E.D. Tex. 1999). Rule 4(m) provides:

> (m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

FED. R. CIV. P. 4(m).

Dougia has offered no explanation for her failure to serve Colton and Dottellis. In fact, although Defendants pointed out the lack of service in their motion for summary judgment, Dougia subsequently made no effort to serve either Colton or Dottellis and does not address the issue in her response to the motion. Thus, under the totality of the circumstances, because service of process was not effected on Colton and Dottellis within the applicable time frame and no good cause has been shown for the failure, dismissal of these defendants without prejudice is appropriate.

C. *Statute of Limitations*

Defendants argue that Dougia's § 1983 claims are barred by the statute of limitations. Because there is no specific federal statute of limitations governing claims brought under § 1983, federal courts look to the law of the state in which the action arose to determine the appropriate limitations period, usually borrowing the state's general personal injury limitations period. *See Hardin v. Straub,* 490 U.S. 536, 538 (1989); *Owens v. Okure,* 488 U.S. 235, 236 (1989); *Wilson v. Garcia,* 471 U.S. 261, 269 (1985); *Piotrowski v. City of Houston,* 237 F .3d 567, 576 (5th Cir.), *cert. denied,* 534 U.S. 820 (2001). "The statute

of limitations for a suit brought under § 1983 is determined by the general statute of limitations governing personal injuries in the forum state." *Id.* In Texas, because there is a two-year statute of limitations for personal injury claims, § 1983 claims must be brought within two years of the date of accrual. *See id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.003); *Gonzales v. Wyatt,* 157F.3d 1016, 1020 (5thCir. 1998); *Burns v. Harris County Bail Bond Bd.,* 139 F.3d 513, 518 (5th Cir. 1998); *Flores v. Cameron County,* 92 F.3d 258, 271 (5th Cir. 1996). Dougia filed suit on July 30, 2003. As a result, any claims based on events that occurred prior to July 30, 2001, are time-barred. It is unclear from Defendants' briefing, however, whether T.S. took action on Dougia's complaint of timber theft in 1998 or in 2001. Dougia's complaint recounts incidents as far back as 1998, but her response to Defendants' motion for summary judgment states that "the complaint is about TFS's actions . . . after they became involved in the case on January 31, 2002."

In his affidavit, Monk states that he first contacted Dougia in August 1998. In their motion for summary judgment, however, Defendants claim that Monk conducted an investigation of Dougia's claims in the fall of 2001. In addition, Dottellis, in his affidavit, states that he conducted a stump appraisal on Dougia's property in May 2002. Moreover, there is no indication from Defendants as to which specific claims they contend are time-barred. Therefore, Defendants have not adduced sufficient evidence to warrant summary judgment on their statute of limitations defense.

D. *Eleventh Amendment Immunity*

Defendants argue that Dougia's claims against them in their official capacities as state officers are barred by the Eleventh Amendment. It is well recognized that "[f]ederal court jurisdiction is limited by the Eleventh Amendment and the

principle of sovereign immunity that it embodies." *Vogt v. Board of Comm'rs of the Orleans Levee Dist.*, 294 F .3d 684, 688 (5th Cir.), *cert. denied*, 537 U.S. 1088 (2002). The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. Absent waiver by the state of sovereign immunity or a valid congressional override, the Eleventh Amendment bars the institution of a damages action in federal court against a state or state instrumentality. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Martinez v. Texas Dep't of Crim. Justice*, 300 F.3d 567, 572-73 (5th Cir. 2002); *Vogt*, 294 F.3d at 688; *Sherwinski v. Peterson*, 98 F.3d 849, 851 (5th Cir. 1996); *Ganther v. Ingle*, 75 F.3d 207, 209 (5th Cir. 1996).

A waiver occurs, however, when a state voluntarily appears in federal court or invokes the federal court's jurisdiction, such as by removing a case to federal court. *See Lapides v. Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 619-24 (2002). Here, Dougia is suing Defendants under both federal and state law, in their individual capacities and also in their official capacities, either as officers of TAMU or employees of T.F.S. It is undisputed that T.F.S. is part of the TAMU system and is, therefore, a state instrumentality. *See Jackson v. Texas Forest Serv.*, 194 F. Supp. 2d 566, 570 (E.D. Tex. 2001). Defendants removed this case to federal court and thus "voluntarily invoked the federal court's jurisdiction." *Lapides*, 535 U.S. at 620.

The doctrine of sovereign immunity does not shield the State of Texas from an action for compensation under the Takings Clause of the Texas Constitution. *See General Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S. W .3d 591, 598 (Tex. 2001). The Texas Constitution, "by authorizing compensation for the taking, damaging or destruction of property, waives a governmental entity's immunity from suit and immunity from liability." *State v. Biggar*, 848 S.W.2d 291, 295 (Tex. App.–Austin 2001), *aff'd*, 873 S. W.2d 11 (Tex. 1994). Accordingly, it is clear from the holding in *Lapides* that by removing this case to federal court, Defendants waived their Eleventh Amendment immunity from Dougia's state constitutional claim. *Id.* at 619- 24. Less clear, however, is whether by removing this case to federal court, Defendants waived their Eleventh Amendment immunity from Dougia's federal claims. The court in *Lapides* limited its holding to "the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Id.* at 611. The United States Court of Appeals for the Fifth Circuit has not addressed the applicability of *Lapides* with regard to the removal of federal claims originally filed in state court, for which the state has not expressly waived its immunity. At least one district court in the Fifth Circuit has held that the rationale of *Lapides* does not apply to § 1983 claims brought against a state in state court, which are subsequently removed to federal court. *See Tanner v. City of Lubbock*, No. Civ. A. 504CV141C, 2004 WL 1933218, at *3 (N.D. Tex. Aug. 21, 2004). The court, however, need not reach this issue, as Dougia's federal claims fail on the merits.

E. *Dougia's Claims Under Federal Law*

1. *Section 1983*

The Civil Rights Act of 1811, 42 U.S.C. § 1983, creates a private right of action for redressing the violation of federal

law by those acting under color of state law. *See Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty,* 538 U.S. 701, 702 (2003); *Conn v. Gabbert,* 526 U.S. 286, 290 (1999); *Livadas v. Bradshaw,* 512 U.S. 101, 132 (1994); *Migra v. Board of Educ.*, 465 U.S. 75, 82 (1984). It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983. "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver,* 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan,* 443 U.S. 137, 144 n.3 (1979)); *accord Graham v. Connor,* 490 U.S. 386, 393-94 (1989); *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 816 (1985); *Felton v. Polles,* 315 F.3d 470,479 (5th Cir. 2002); *Jackson v. City of Atlanta,* 73 F.3d 60, 63 (5th Cir.), *cert. denied,* 519 U.S. 818 (1996).

a. *Rule 7(a) Reply*

In her original petition, Dougia stated that the purported failure of Defendants to investigate her claims of timber theft was "a clear violation of 42 U.S.C.S. section 1983." She did not allege that Defendants deprived her of any specific right guaranteed by the Constitution or the laws of the United States for which she could seek redress through a § 1983 action. The court, therefore, granted Defendants' motion for a reply under FED. R. CIV. P. 7(a). The Fifth Circuit has held that when a public official pleads an affumative defense in response to a §

1983 action, the district court "may require the plaintiff to reply to that defense in detail" pursuant to FED. R. CIV. P. 7(a). *Schultea v. Wood,* 47 F.3d 1427, 1433-34 (5th Cir. 1995); *see Johnson v. Johnson,* 385 F.3d 503, 529 (5th Cir. 2004). When granting the motion for the Rule 7(a) reply, the court ordered Dougia to "file an amended complaint which supports her claim with specific precision and factual specificity to raise a genuine issue as to the illegality of each individual defendant's conduct at the time of the alleged acts." The court cautioned Dougia "to tailor the amended complaint to the assertions of qualified immunity by each defendant, and . . . set out what acts of each defendant violated one or more established statutory or constitutional rights . . . of which a reasonable person would have known."

In her amended complaint, Dougia names seven persons as Defendants and alleges that her Fifth and Fourteenth Amendment rights were violated by said Defendants. To comply with the terms of the Rule 7(a) order, however, she was required to identify each defendant by name, set forth the alleged illegal acts he committed, and specify the constitutional right he thereby violated. Dougia's amended complaint satisfies this standard with respect to only one defendant, Monk.

Defendants Hull, Young, and Bennett are never mentioned by name, title, or even job description. Former Chancellor Graves is referred to only once, when Dougia asserts that Graves, as chancellor of TAMU, was aware of her allegations *of* inaction on the part of TFS, yet did nothing about it. Mere negligence, however, is not enough *to* establish a violation of § 1983. *See Campbell v. City of San Antonio,* 43 F.3d 973, 977 (5th Cir. 1995); *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir.), *cert. denied,* 506 U.S. 973 (1992). Monk is the only defendant who was named, properly served, and alleged to have committed specific acts that Dougia contends violated her Fifth and Fourteenth Amendment rights. Defendants seek

dismissal of all Dougia's federal claims based on her failure to comply fully with the court's Rule 7(a) order. In response, Dougia maintains that her amended complaint speaks for itself, as it "fully sets forth the actions and inactions of the Defendants that give rise [to] her causes of action." While dismissal may be warranted, at least in part, for pleading deficiencies, the court will consider the contents of Dougia's amended complaint in connection with Defendants' summary judgment motion.

b. *Actions Against State Officials in their Official Capacity*

In the context of actions brought under 42 U.S.C. § 1983, a state is not considered a "person" against whom a claim for damages may be asserted under the statute. *See Lapides,* 535 U.S. at 617 (citing *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 64 (1989)). Hence, while state officials literally are persons, if sued in their official capacities, they are not deemed to be "persons" who can be sued for damages under § 1983. *See Will,* 491 U.S. at 71. A suit against an official in his or her official capacity is not a suit against the official, but rather is a suit against the official's office. *See id.; Brandon v. Holt,* 469 U.S. 464, 471 (1985); *Monell v. Department of Social Servs.,* 436 U.S. 658, 691 n.55 (1978); *Ganther,* 75 F.3d at 209. Thus, it is no different from a suit against the state itself. *See Will,* 491 U.S. at 71 (citing *Graham,* 473 U.S. at 165-66; *Monell,* 436 U.S. at 691 n.55). Accordingly, Dougia's monetary claims brought under § 1983 against Defendants in their official capacities for violation of her Fifth and Fourteenth Amendment rights are foreclosed. Because McTeer and Hull are sued solely in their official capacities, the only relief Dougia may seek against them is prospective in nature.

c. *Elements of Section 1983 Claim*

There are three elements to establish liability in a § 1983 action. *See Victoria W. v. Larpenter,* 369 F.3d 475, 482 (5th Cir. 2004) (citing *Bush v. Viterna,* 795 F.2d 1203, 1209 (5th Cir. 1986)). To prevail, the plaintiff must show "(1) a deprivation of a right secured by federal law (2) that occurred under color of state law, and (3) was caused by a state actor." *Id.; see American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 49-50 (1999); *Blessing v. Freestone,* 520 U.S. 329, 340 (1997); *Daniels v. Williams,* 474 U.S. 327, 330 (1986); *Priester v. Lowndes County,* 354 F.3d 414, 420 (5th Cir.), *cert. denied,* 125 S. Ct. 153 (2004). A § 1983 complainant must support her claim with specific facts demonstrating a constitutional deprivation and may not simply rely on conclusory allegations. *See Schultea,* 47 F.3d at 1433; *Fee v. Herndon,* 900 F.2d 804, 807 (5th Cir.), *cert. denied,* 498 U.S. 908 (1990); *Jacquez v. Procunier,* 801 F.2d 789, 793 (5th Cir. 1986); *Angel v. City of Fairfield,* 793 F.2d 737, 739 (5th Cir. 1986); *Elliott v. Perez,* 751 F.2d 1472, 1482 (5th Cir. 1985).

Thus, for Dougia to recover, she must produce evidence that supports her claim that Defendants deprived her of rights guaranteed by the Fifth and/or Fourteenth Amendment to the Constitution. *See Daniels,* 474 U.S. at 329-31; *Baker,* 443 U.S. at 139; *Hernandez v. Texas Dep't of Protective & Regulatory Servs.,* 380 F.3d 872, 879-80 (5th Cir. 2004); *Victoria W.,* 369 F.3d at 482; *Rosborough v. Management & Training Corp.,* 350 F.3d 459, 460 (5th Cir. 2003). "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Victoria W.,* 369 F .3d at 482 (citing *Baker*, 443 U.S. at 146; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 450 (5th Cir. 1994)). Dougia must also prove that the alleged constitutional or statutory deprivation was intentional or due to deliberate indifference-not the result of mere negligence. *See Farmer v.*

Brennan, 511 U.S. 825, 828-29 (1994); *Davidson v. Cannon,* 474 U.S. 344, 348 (1986); *Daniels,* 474U.S. at 328; *Estelle v. Gamble,* 429 U.S. 97, 105 (1976). The negligent deprivation of life, liberty, or property is not f a constitutional violation. *See Campbell,* 43 F.3d at 977; *Fraire,* 957 F.2d at 1276; *Herrera v. Millsap,* 862 F.2d 1157, 1160 (5thCir. 1989); *Simmons v. McElveen,* 846 F.2d337, 339 (5thCir. 1988). Moreover, to hold a defendant liable under § 1983, Dougia must adduce facts demonstrating the defendant's participation in the alleged wrong. A § 1983 plaintiff must not only establish a violation of one of her constitutional rights but "must also show a causal connection between the deprivation of that right and the actions of the defendant against whom relief is sought." *Coggin v. Longview Indep. Sch. Dist.,* 337 F.3d 459, 472-73 (5th Cir.), *cert. denied,* 124 S. Ct. 579 (2003); *see Anderson v. Pasadena Indep. Sch. Dist.,* 184 F.3d 439, 443 (5th Cir. 1999); *Murphy v. Kellar,* 950 F.2d 290, 292 (5th Cir. 1992); *Jacquez,* 801 F.2d at 793.

(1). *The Takings Clause of the Fifth Amendment*

Dougia does not specifically raise a Fifth Amendment Takings Clause claim in either her original petition or her amended complaint. She simply alleges that her Fourteenth Amendment rights were violated, stating, "these claims are brought as inverse condemnation and nuisance claims as a result of which the Plaintiff lost her property interest in land and timber." In their motion for summary judgment, Defendants construe these allegations as a claim under the Takings Clause of the Fifth Amendment. "The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides that 'private property' shall not be taken for public use, without 'just compensation.'" *Hatfield v. Scott,* 306 F. 3d 223, 226 (5th Cir. 2002) (quoting *Phillips v. Washington Legal Found.,* 524 U.S. 156, 163-

64(1998)). The purpose of the Takings Clause "is to prevent the government from 'forcing some people alone to bear public burdens, which, in all fairness, and justice, should be borne by the public as a whole.'" *United States Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 416 (5th Cir. 2000) (quoting *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998)).

In an inverse condemnation action under the Fifth Amendment, a landowner seeks to recover "just compensation for a taking of his property when condemnation proceedings have not been instituted." *United States v. Clarke*, 445 U.S. 253, 257 (1980). It is "'*a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" *Id.* (quoting D. Hagman, *Urban Planning and Land Development Control Law*, 328 (1971) (emphasis added)).

Here, Dougia has adduced no evidence that Defendants took, damaged, or destroyed her property. In fact, she contends that Griffin and his GFI crew, not the governmental Defendants, "cut down and stole the lumber from her various tracks [sic] of land and sold the lumber to Lonnie Grissom." The record reflects that Defendants never took physical possession of Dougia's timber; nor have Defendants or TFS enacted any rules or regulations restricting Dougia's ability to plant, harvest, or sell her timber. Dougia has offered no evidence, not even her own affidavit, to substantiate her claim that Defendants took her timber.

Dougia's Takings Clause claim seems to rest on her allegation that Defendants have a duty to investigate timber theft, and, "in improperly doing their job, or failing completely, they have allowed Plaintiff's property to be damaged." Dougia, however, has not offered any evidence that Defendants

unlawfully refused to investigate her claim or any facts to rebut Monk's sworn attestation that he conducted a thorough investigation of her allegations of timber theft, including an examination of mill tickets and a stump appraisal of her property, conducted by Dottellis, an experienced forester. Accordingly, Dougia's federal inverse condemnation cause of action cannot stand. In addition, unlike the Takings Clause of the Texas Constitution, there is no authority to support a nuisance claim based on the Takings Clause of the Fifth Amendment.

Because Dougia has not demonstrated a deprivation of her Fifth Amendment rights at the hands of Defendants, she cannot meet the threshold element for establishing liability on such a claim under § 1983. Accordingly, Defendants are entitled to summary judgment on Dougia's claim for violation of the Fifth Amendment.

(2). *Fourteenth Amendment Claim*

Dougia does not identify the type of Fourteenth Amendment claim she is pursuing in this lawsuit. Based on her amended complaint and her response to Defendants' summary judgment motion, it appears that she is contending that Defendants deprived her of property (her timber) without due process of law in violation of the Fourteenth Amendment. The Fifth Circuit has held that "'individuals may look to several constitutional provisions for protection against state action that results in a deprivation of their property.'" *Simi Inv. Co., Inc. v. Harris County,* 236 F.3d 240, 247-48 (5th Cir. 2000), *cert. denied,* 534 U.S. 1022 (2001) (quoting *John Corp. v. City of Houston,* 214 F.3d 573, 582 (5th Cir. 2000)). One of these provisions "is the substantive due process component of the Fourteenth Amendment which guarantees that individuals shall not be deprived of their property without due process of law." *Id.* (citing U.S. CONST. amend. XIV, § 1). In addition, "when

a state interferes with property interests, a substantive due process claim *may* survive a takings analysis." *Id.* (emphasis in original).

As with her Fifth Amendment Takings Clause claim, however, Dougia has not shown that Defendants interfered with her property interests. She has produced no evidence of governmental conduct that deprived her of her timber. Instead, she asserts only conclusory allegations that Defendants failed to investigate adequately her claim of timber theft. An inadequate investigation conducted by the state, however, is itself "insufficient to state a civil rights claim unless another recognized constitutional right is involved," which is not the case here. *Witty v. Simpson,* No. 3-01-CV-5-R, 2001 WL 184251, at *3 (N.D. Tex. Jan. 31, 2001) (citing *Andrews v. Fowler,* 98 F.3d 1069, 1079 (8th Cir. 1996)).

Further, even if loggers improperly took timber from Dougia's property, a state's failure to protect an individual against private violence is not a violation of the Due Process Clause of the Fourteenth Amendment. *See DeShaney v. Winnebago County Dep't of Social Servs.,* 489 U.S. 189, 197 (1989); *Beltran v. City ofElPaso,* 367 F.3d 299, 304 (5th Cir. 2004). "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney,* 489 U.S. at 195. While, under some limited circumstances, the Constitution imposes upon the state an affirmative duty of care and protection, such as for those held in state custody, no such duty arises in this situation. *Id.* at 197, 199-00.

In the absence of governmental interference with her property rights and any state obligation to protect her property, Dougia cannot maintain an action for deprivation of property without due process of law in violation of the Fourteenth Amendment. Accordingly, she cannot meet the threshold

element in establishing liability on a § 1983 claim, *i.e.*, that she suffered a violation of her constitutional rights. Therefore, summary judgment is proper as to Dougia's claim for violation of the Fourteenth Amendment.

d. *Qualified Immunity*

Assuming, arguendo, that Dougia were able to establish a deprivation of a federal constitutional or statutory right, Defendants Young, Bennett, and Monk are protected by qualified immunity from Dougia's claims brought against them in their individual capacities. Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) *(citing Procunier v. Navarette,* 434 U.S. 555, 565 (1978); *Wood v. Strickland,* 420 U.S. 308, 322 (1975)); *see Beltran,* 367 F.3d at 302-03; *Felton,* 315 F.3d at 477; *Bazan v. Hidalgo County,* 246 F.3d 481, 488 (5th Cir. 2001); *Thompson v. Upshur County,* 245 F.3d 447, 457 (5th Cir. 2001). "An official acts within his discretionary authority when he performs nonministerial acts within the boundaries of his official capacity." *Id.* at 1091-92 (citing *Cronen v. Texas Dep't of Human Servs.,* 977 F.2d 934, 939 (5th Cir. 1992)).

> The qualified or "good faith" immunity doctrine was established to reconcile two competing interests. One interest is the compensation of persons whose federally protected rights have been violated. Opposing this is the fear that personal liability will inhibit public officials in the discharge of their duties. Qualified immunity has i therefore been recognized to protect "all but the plainly incompetent or those who knowingly violate the law."

Johnston v. City of Houston, 14 F.3d 1056, 1059 (5th Cir. 1994) (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

Qualified immunity is available to defendant officials in suits arising under § 1983 and is an immunity from suit, extending beyond a defense to liability to include all aspects of civil litigation, including discovery. *See Heitschmidt v. City of Houston,* 161 F.3d 834, 840 (5th Cir. 1998); *Babb v. Dorman,* 33 F.3d 472, 477 (5th Cir. 1994); *Jacquez,* 801 F.2d at 791; *see also Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz,* 533 U.S. 194, 200 (2001) (quoting *Mitchell,* 472 U.S. at 526). Because it is "an affirmative defense, the defendant must both plead and establish his entitlement to immunity." *Tamez v. City of San Marcos,* 118 F.3d 1085, 1091 (5th Cir. 1997), *cert. denied,* 522 U.S. 1125 (1998) (citing *Gomez v. Toledo,* 446 U.S. 635, 640 (1980); *Cronen,* 977 F.2d at 939); *see Siegert v. Gilley,* 500 U.S. 226, 231 (1991); *Harlow,* 457 U.S. at 815. Nevertheless, the Fifth Circuit has explained:

> "Where a defendant pleads qualified immunity and shows he is a governmental official whose position involves the exercise of discretion, the *plaintiff then has the burden* 'to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law.' We do 'not require that an official demonstrate that he did not violate clearly established federal rights; *our precedent places that burden upon plaintiffs.*'"

Felton, 315 F.3d at 477 (emphasis in original) (quoting *Pierce v. Smith,* 117 F.3d 866, 871-72 (5th Cir. 1997) (internal citations omitted) (quoting *Salas v. Carpenter,* 980 F.2d 299, 306 (5th Cir.1992»); *accord Bazan,* 246 F.3d at 489-90.

"Whether a government official is entitled to qualified immunity 'generally turns on the "objective reasonableness of the action" assessed in light of the legal rules that were "clearly established" at the time it was taken.'" *Johnston,* 14 F.3d at 1059 (quoting *Texas Faculty Ass'n v. University of Tex. at Dallas,* 946 F.2d 379, 389 (5th Cir. 1991) (quoting *Anderson v. Creighton,* 483 U.S. 635, 639 (1987)); *see Siegert,* 500 U.S. at 231; *Mitchell,* 472 U.S. at 530; *Harlow,* 457 U.S. at 818; *Petta v. Rivera,* 143 F.3d 895, 899-900 (5th Cir. 1998); *Tamez,* 118 F.3d at 1095 n.5. A defendant "is entitled to qualified immunity unless he violated a constitutional right that was clearly established at the time of his conduct." *Blackwell v. Barton,* 34 F.3d 298, 302-03 (5th Cir. 1994) (citing *Pfannstiel v. City of Marion,* 918 F.2d 1178, 1183 (5th Cir. 1990)); *see Saucier,* 533 U.S. at 201; *Harper v. Harris County,* 21 F.3d 597, 600 (5th Cir. 1994). In considering a claim of qualified immunity, the court must make a two-pronged inquiry:

> "The bifurcated test for qualified immunity is quite familiar: (1) whether the plaintiff has alleged a violation of a clearly established constitutional [or federal statutory] right; and, (2) if so, whether the defendant's conduct was objectively unreasonable in the light of the clearly established law at the time of the incident."

Felton, 315 F.3d at 477 (quoting *Hare v. City of Corinth,* 135 F.3d 320, 325 (5th Cir. 1998)); *accord Beltran,* 367 F .3d at 303; *Hernandez,* 380 F .3d at 879; *Price v. Roark,* 256 F .3d 364, 369 (5th Cir. 2001); *Sorenson v. Ferrie,* 134 F.3d 325, 327 (5th Cir. 1998).

"The first prong requires determining 'whether the plaintiff has alleged the deprivation of an *actual* constitutional [or statutory] right,' – that is, a right '*clearly established* . . .under . . . *currently applicable* . . . standards.'" *Felton,* 315 F. 3d at

477 (emphasis in original) (quoting *Conn*, 526 U.S. at 290; *Hare*, 135 F.3d at 325-26). "Only if the plaintiff has done so should the court proceed to the second prong." *Id.* A legal right is clearly established if the contours of the right are sufficiently clear that reasonable officials would understand that their conduct violates that right. *See Anderson*, 483 U.S. at 640; *Johnston*, 14 F.3d at 1059; *Bennett v. City of Grand Prairie*, 883 F.2d 400, 408 (5th Cir. 1989). Here, Dougia has not shown that she had a clearly established constitutional or federal statutory right requiring Defendants to investigate thoroughly her claim of timber theft.

In any event, assuming, *arguendo*, that Dougia had such a constitutional or statutory right, "'if reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity .'" *Blackwell*, 34 F.3d at 303 (quoting *Pfannstiel*, 918 F.2d at 1183); *accord Johnston*, 14 F.3d at 1059; *see Malley*, 475 U.S. at 341; *Cantu v. Rocha*, 77 F .3d 795, 806 (5th Cir. 1996). "The second prong 'focuses not only on the state of the law at the time of the complained of conduct, but also on the particulars of the challenged conduct and/or of the factual setting in which it took place.'" *Felton*, 315 F.3d at 478 (quoting *Pierce*, 117 F.3d at 872). "A 'defendant's acts are . . . objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff.'" *Id.* (quoting *Thompson*, 245 F.3d at 457 (emphasis in original)).

In assessing the reasonableness of an official's actions, the court is not to employ the "20/20 vision of hindsight." *Colston v. Barnhart*, 130 F .3d 96, 99 (5th Cir. 1997), *cert. denied*, 525 U.S. 1054 (1998) (citing *Graham*, 490 U.S. at 396). As the Fifth Circuit has observed in the context of a Fourth Amendment claim alleging wrongful arrest:

> In suits alleging illegal arrest, the qualified immunity determination turns on whether "'a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the . . . officer [ ] possessed.' Even law enforcement officials who 'reasonably but mistakenly believe that probable cause is present' are entitled to immunity."

Babb, 33 F.3d at 477 (quoting *Hunter v. Bryant*, 502 U.S. 224, 226 (1991) (quoting *Anderson*, 483 U.S. at 641)); *see Bazan*, 246 F.3d at 488; *Sorenson*, 134 F.3d at 328; *Baker*, 75 F.3d at 198. In other words, if Defendants' conduct in investigating Dougia's claim of timber theft was objectively reasonable, they may invoke qualified immunity, even if the conduct infringed upon Dougia's constitutional rights. *See Kipps v. Caillier*, 197 F.3d 765, 769 (5th Cir. 1999); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 445 (5th Cir. 1998); *Pfannstiel*, 918 F.2d at 1183.

In her amended complaint, Dougia references § 88.102 of the Texas Education Code, which enumerates the general duties of the director of the TFS. One of these duties is to "enforce all laws pertaining to the protection of forests and woodlands and prosecute violations of those laws." TEX. EDUC. CODE ANN. § 88.102(4). Defendants, however, through the sworn affidavits of Monk and Dottellis, have provided uncontroverted evidence detailing how TFS personnel investigated Dougia's claims but ultimately found no evidence to support her assertions of timber theft and no violations to prosecute.

"A plaintiff must clear a significant hurdle to defeat qualified immunity." *Brown v. Lyford*, 243 F.3d 185, 190 (5th Cir. 2001). Once an official asserts his entitlement to qualified immunity in a properly supported motion for summary judgment, the plaintiff bears the burden of coming forward with sufficient summary judgment evidence to sustain a

determination that the official's actions violated clearly established federal law. *See Blackwell,* 34 F.3d at 301; *Salas,* 980F.2d at 304, 306; *Bennett,* 883 F.2d at 408; *United States v. Burzynski Cancer Research Inst.,* 819 F.2d 1301, 1310 (5th Cir. 1987), *cert. denied,* 484 U.S. 1065 (1988); *Saldana v. Garza,* 684 F.2d 1159, 1163 (5th Cir. 1982), *cert. denied,* 460 U.S. 1012 (1983). Hence, to prevail, Dougia must show that Defendants knew or reasonably should have known that the actions they were taking within their sphere of official responsibility would violate her constitutional rights. *See Harlow,* 457 U.S. at 818; *Schultea,* 47 F.3d at 1431-32.

In this case, Dougia has produced no evidence demonstrating that Defendants knew or should have known that their actions in investigating her claim of timber theft violated clearly established federal law. Moreover, Defendants' conduct in investigating her claims was objectively reasonable, notwithstanding that the outcome of the investigation was not to Dougia's liking. Accordingly, the individual Defendants are shielded from Dougia's federal claims by qualified immunity.

F. *Claims Under State Law*

Dougia further alleges that Defendants took her timber in violation of the Takings Clause of the Texas Constitution, which provides that "no person's property shall be taken, damaged or destroyed or applied to public use without adequate compensation being made, unless by consent of such person . . . " TEX. CONST. art. 1, § 17. Dougia alleges three theories of wrongful appropriation of her property. In her amended complaint, she characterizes her action as an inverse condemnation and nuisance claim. In response to Defendants' summary judgment motion, she states that Defendants, in "improperly doing their job, or failing completely, [ ] have allowed Plaintiff's property to be damaged." To establish a claim under anyone of these theories, however, Dougia must

demonstrate (1) the State or governmental entity intentionally performed certain acts, (2) that resulted in the taking, damage, or destruction of the owner's property, (3) for a public purpose. *See General Servs. Comm'n,* 39 S. W.3d at 598.

Inverse condemnation under the Texas Constitution occurs when "property is taken for public use without process or proper condemnation proceedings, and the property owner attempts to recover compensation therefor." *Waddy v. City of Houston,* 834 S.W.2d 97, 102 (Tex. App.– Houston [1st Dist.] 1992, writ denied) (citing *Allen v. City of Texas City,* 775 S.W.2d 863, 864 (Tex. App.– Houston [1st Dist.] 1989, writ denied)). Dougia's inverse condemnation claim is without merit because she has proffered no evidence that Defendants intentionally took, damaged, or destroyed her property or that they did so for a public purpose.

A plaintiff may also recover under the Takings Clause of the Texas Constitution by establishing that a governmental entity created or maintained a nuisance in the course of the non-negligent performance of a governmental function. *See City of Abilene v. Downs,* 367 S.W.2d 153, 159 (Tex. 1963). The nuisance must "constitute an unlawful invasion of the property or rights of others that is inherent in the thing or condition itself beyond that arising from its negligent or improper use." *Hunt County* v. *Dallas, Garland & Northeastern R.R.,* No. 05-03-01587-CV, 2004 WL 1178609, at *5 (Tex. App.– Dallas May 28, 2004, no writ). Dougia provides no evidence or explanation as to how Defendants' conduct created a nuisance that constituted an unlawful invasion of her property. She, likewise, makes no showing that the governmental activity which purportedly created the nuisance was done for a public purpose.

A "damaging" of one's property pursuant to the Texas Takings Clause means "every loss or diminution of what is a person's own." *Texas Workforce Comm'n v. Midfirst Bank,* 40

S.W.3d 690, 697 (Tex. App.– Austin 2001, pet. denied). Not every damaging of a person's property need be compensated, however. *See Steele v. City of Houston,* 603 S.W.2d 786,790 (Tex. 1980). "The Constitution limits compensation to damages 'for or applied to public use,' and judicial restraints have narrowed that phrase to damages which arise out of or as an incident to some kind of public works." *Id.* In this instance, even if Defendants failed to investigate Dougia's claim of timber theft, she provides no authority to support her contention that this failure constitutes a damaging of her property in violation of the Texas Constitution. Furthermore, Dougia adduces no evidence that Defendants' alleged failure to investigate, and any ensuing property damage, was for a public use or was the result of a public work.

Under these circumstances, Dougia has not demonstrated that Defendants either took, damaged, or destroyed her property for a public purpose, a prerequisite for recovery under the Takings Clause of the Texas Constitution. Therefore, summary judgment is mandated on Dougia's state constitutional claim.

III. *Conclusion*

Dougia did not timely serve process on Defendants Colton or Dottellis, and they are dismissed as defendants to this lawsuit. As for the remaining Defendants, there are no material facts in dispute with regard to Dougia's claims alleging violations of the Fifth and Fourteenth Amendments to the United States Constitution and the Takings Clause of the Texas Constitution, and Defendants are entitled to judgment as a matter of law. accordingly, Defendants McTeer, Hull, Young, Bennett, and Monk's motion for summary judgment is granted.

IT IS SO ORDERED.

SIGNED at Beaumont, Texas, this 23rd day of November, 2004.

/s/ Marcia A. Crone
Marcia A. Crone
United States District Judge